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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SAMUEL LEWIS, DIRECTOR ARIZONA DEPARTMENT OF CORRECTIONS, GRANT WOODS, ARIZONA ATTORNEY GENERAL,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,
Respondent,

MICHAEL EMERSON CORRELL, JOSE ROBERTO VILLAFUERTE, JIMMY ALAN ARNETT,
Real Parties in Interest.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in refusing, on petition for mandamus, to direct respondent to accelerate its handling of three capital habeas corpus cases, and to promulgate general time limitations applicable to all capital habeas corpus petitions pending within the circuit.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATEMENT OF THE CASE 2

1. Correll v. Lewis 3
2. Villafuerte v. Lewis 5
3. Arnett v. Lewis 6

REASONS FOR DENYING THE WRIT 8

I. THERE IS NO BASIS FOR AN ORDER OF MANDAMUS RELATING TO RESPONDENT'S HANDLING OF THE *CORRELL, VILLAFUERTE OR ARNETT* PETITIONS 9

A. Mandamus Is An Exceptional Remedy Which Is Only Available To Limit A Court's Discretionary Control Of Its Calendar Where The Court Has Persistently Refused To Adjudicate A Matter Properly Before It 9

B. Petitioner Has Failed To Show Any Refusal Or Unreasonable Delay By The District Court In Exercising Its Jurisdiction To Resolve The Habeas Corpus Petitions In Issue 15

II. THIS COURT SHOULD NOT GRANT REVIEW FOR THE PURPOSE OF PROMULGATING PROSPECTIVE TIME-LIMITS ON THE HANDLING OF FEDERAL HABEAS CORPUS CASES 20

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Cases

Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988), *cert. denied*, 497 U.S. 1031 (1990) 3, 17
Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 9, 10, 23
Amadeo v. Zant, 486 U.S. 214 (1988) 14
Arizonians for Fair Representation v. Symington, 828 F. Supp. 684 (D. Ariz. 1992), *aff'd* 113 S.Ct. 1573 (1993) 23
Arnett v. Ricketts, 665 F. Supp. 1437 (D. Ariz. 1987) 6
Barefoot v. Estelle, 463 U.S. 880 (1983) 12, 14
Barker v. Wingo, 407 U.S. 514 (1972) 21, 25
In re Blodgett, 112 S. Ct. 674 (1992) 11, 12, 13, 14, 20
Bounds v. Smith, 430 U.S. 817 (1977) 14
Campbell v. Blodgett, 940 F.2d 549 (9th Cir. 1991) 13, 14, 15
Chandler v. Judicial Council of Tenth Circuit, 398 U.S. 74 (1970) 22
Insurance Co. v. Comstock, 83 U.S. (16 Wall.) 258 (1873) 15
Johnson v. Rogers, 917 F.2d 1283 (10th Cir. 1990) 16
Jones v. Shell, 572 F.2d 1278 (8th Cir. 1978) 16
Kimmelman v. Morrison, 477 U.S. 365 (1986) 13
La Buy v. Howes Leather Co., 352 U.S. 249 (1957) 15
Lewis v. Jeffers, 497 U.S. 764 (1990) 3, 17
Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701 (1927) 10
McClellan v. Young, 421 F.2d 690 (6th Cir. 1970) 16
McCleskey v. Zant, 111 S. Ct. 1454 (1991) 14, 25
Miner v. Atlass, 363 U.S. 641 (1960) 21
Ortega Rodriguez v. United States, 113 S. Ct. 1199 (1993) 24
Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943) 9

TABLE OF AUTHORITIES (Cont'd)

Page

Sawyer v. Whitley, 112 S. Ct. 2514 (1992) 12
Sibbach v. Wilson & Co., 312 U.S. 1 (1941) 22
Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976) 15
United States v. Taylor, 487 U.S. 326 (1988) 10
Vasquez v. Hillery, 474 U.S. 254 (1986) 14
Walton v. Arizona, 497 U.S. 639 (1990) 3
Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978) . . . 10, 11
Will v. United States, 389 U.S. 90 (1967) 15
Wingo v. Wedding, 418 U.S. 461 (1974) 14
Zant v. Stephens, 462 U.S. 862 (1983) 13

Statutes and Rules

28 U.S.C. § 332(d) (1988) 22
28 U.S.C. § 1254(1) (1988) 2
28 U.S.C. § 1292(b) (1988) 7
28 U.S.C. §1651(a) (1988) 2
28 U.S.C. § 1657 (1988) 11
28 U.S.C. § 2071 (1988) 21
28 U.S.C. § 2072 (1988) 21
28 U.S.C. § 2074 (1988) 21
Speedy Trial Act, 18 U.S.C. § 3161 *et seq* 21
Ariz. R. Crim. P. 32 25
28 U.S.C. § 2254, Rules Governing Section 2254 Cases in the United States District Courts, R. 8 (1988) 12, 21

Miscellaneous Authorities

Administrative Office of the United States Courts, Management Statistics for United States Courts (1978) 10
Administrative Offices of the United States Courts, Management Statistics for United States Courts (1992) 10, 22

TABLE OF AUTHORITIES (Cont'd)

Page

Sarah Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of Federal Courts*, 84 Colum. L. Rev. 1433 (1984) 21
Chief Justice Discusses Changes in Justice System, The Third Branch, Nov. 1993, at 7 8
Ninth Circuit Judicial Council's Death Penalty Task Force, *Capital Punishment Handbook* (1991) 25
16 Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 3933 (1977) 11

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. B-1) is unreported.

STATEMENT OF JURISDICTION

The order of the court of appeals denying the State's petition for mandamus was entered on July 21, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651(a) (1988).

STATEMENT OF THE CASE

This case arises from the denial of a petition for a writ of mandamus filed by the State of Arizona on July 1, 1993 with the United States Court of Appeals for the Ninth Circuit. The petition asked the court of appeals to order respondent[1] to rule on five capital habeas corpus cases in accordance with particular time limitation periods applicable to different aspects of the proceedings, and to promulgate those time limits as generally applicable to district courts in the handling of capital habeas corpus cases.[2] Respondent did not respond, and on July 21, 1993, the Ninth Circuit denied the petition in a one-sentence order. The State now petitions for certiorari from the Ninth Circuit's denial concerning three of the five cases on which relief was originally sought.[3]

A brief procedural history of the three cases in issue is set forth below.[4]

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[1] Respondent, the United States District Court for the District of Arizona, will be also be referred to herein as "the court."

[2] Petitioner urged that district courts be allowed 120 days to decide dispositive motions, 30 days to decide procedural motions, and 180 days to hold an evidentiary hearing. Pet. App. A-17, A-26.

[3] In addition, the State further "prays that the Court exercise its supervisorial authority and order that the District Court rule on all future capital cases" within the same specified time limits that it urged on the court of appeals. (Pet. at 19).

[4] A more complete chronology of significant events is attached as Appendix A, where bold text indicates information that was not included in the State's petition for certiorari.

1. Correll v. Lewis.

On September 18, 1987, respondent granted Michael Emerson Correll's application for a stay of execution. On January 7, 1988, the court granted Correll's request for leave to file an amended petition, which was filed on February 24, 1988. On April 10, 1989, the State filed a motion to dismiss the amended petition, alleging that Correll failed to exhaust his remedies in State court.[5] Respondent denied that motion on June 5, 1989.

On June 14, 1989, the State moved for a stay of all further proceedings, in light of the Ninth Circuit's decision in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), *cert. denied*, 497 U.S. 1031 (1990), finding Arizona's death penalty statute unconstitutional. On July 21, 1989, the court granted the State's request only with respect to the sentencing phase claims, and ordered the State to file a response to the guilt phase claims by August 20, 1989.

On September 7, 1989, the State filed two separate summary judgment motions addressing only the guilt phase claims. On March 14, 1990, respondent granted Correll's request to amend the petition by adding two claims, and the State subsequently filed a third summary judgment motion with respect to these newly-added claims.

On July 13, 1990, the entire case was transferred to a newly-appointed district court judge. On September 6, 1991, the State requested a ruling in the case and cited this Court's decisions in *Walton v. Arizona*, 497 U.S. 639 (1990), and *Lewis v. Jeffers*, 497 U.S. 764 (1990), which upheld particular applications of the Arizona death penalty statute and which had been handed down fourteen months earlier. On September 28, 1991, respondent set a status conference for October 4, 1991.

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[5] The State claimed that it had not received any notice of two court orders requiring a timely response to any amended petition. However, the amended petition had attached to it a proof of service showing that it had been served on the State.

At the October 4, 1991 status conference, the State asked respondent to allow Correll to amend his petition to raise additional claims and supplement previous claims, and agreed with respondent and Correll's counsel that the most efficient approach to disposing of the entire case was to vacate the previously filed motions for summary judgment and proceed by filing a single motion addressing all issues. Respondent vacated the prior stay concerning sentencing claims, set a briefing schedule and scheduled a status conference for May 11, 1992.

Accordingly, on December 6, 1991, Correll filed an amended petition that raised approximately fifty-three separate claims. On February 14, 1992, the State filed a motion for summary judgment addressing both procedural default and merits issues. On May 15, 1992, Correll filed his response and moved to expand the record. On June 19, 1992, respondent heard oral argument on the State's motion for summary judgment.

On July 22, 1993, respondent filed a thirty-nine-page order denying Correll's motion to expand the record, and finding procedural default as to twenty-six claims because (1) some claims were never presented in any state forum; (2) some claims were presented in a procedurally inappropriate manner and were found defaulted by the state courts; (3) some claims, even if presented and reviewed, were waived by Correll's failure to preserve them in a motion for rehearing; and (4) the Arizona Supreme Court found two of the claims waived on direct review.

The order permitted Correll thirty days to submit any arguments demonstrating cause and prejudice, and granted the State's May 29, 1992 motion for an extension of time to file a brief responding to allegations of cause and prejudice and, if necessary, further addressing the merits of certain claims. Respondent then noted that the remainder of the State's summary judgment motion would be ripe for final adjudication only when the State had responded to Correll's assertions of cause and prejudice or addressed the merits of any defaulted claims for which Correll was able to demonstrate cause and prejudice.

On August 31, 1993, the State filed objections to respondent's order, arguing that Correll should not be allowed additional time to demonstrate cause and prejudice. On September 13, 1993, Correll filed a motion for reconsideration, which set forth his position concerning cause and prejudice. On October 18, 1993, respondent held a status conference at which it granted the State's motion to file late its response to Correll's motion.

On November 1, 1993, the State filed its final response on the issues of cause and prejudice.

2. Villafuerte v. Lewis

On May 14, 1991, respondent issued a stay of the execution of Jose Roberto Villafuerte. On July 19, 1991, Villafuerte filed his first amended petition for a writ of habeas corpus, and the State responded with a motion for summary judgment on August 26, 1991.

On October 11, 1991, Villafuerte filed a motion to expand the record and a request for an evidentiary hearing. On November 14, 1991, after receiving all of the parties' briefs addressing the outstanding motions, respondent scheduled oral argument for March 16, 1992.[6]

Following argument, on August 3, 1992, respondent issued a written order that found six claims procedurally barred, required Villafuerte to demonstrate cause and prejudice as to those claims in a supplemental brief, and dismissed without prejudice Villafuerte's motion for an evidentiary hearing. On August 21, 1992, Villafuerte moved for reconsideration of respondent's order (in lieu of briefing on issues of cause and prejudice). The State filed its opposition on September 4, 1992, and supplemented that opposition on October 15, 1992.

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[6] Between November 14, 1991 and March 16, 1992, the State filed the transcripts from the state court proceedings and, pursuant to respondent's December 10, 1991 order, Villafuerte filed a statement of facts in support of his response to the State's summary judgment motion.

On July 9, 1993, respondent issued a written order that denied Villafuerte's motion for reconsideration of respondent's August 3, 1992 order and entered summary judgment for the State on the six claims found barred. On September 29, 1993, respondent issued an eighty-one-page order that denied Villafuerte relief on the merits of the remaining twenty-one claims and vacated the stay of execution.

3. Arnett v. Lewis

After vacating its prior dismissal of Jimmy Alan Arnett's initial petition for habeas corpus that was filed in 1983, respondent, on November 22, 1985, granted Arnett's motion for discovery, and *sua sponte* granted summary judgment for the State on several claims in Arnett's amended petition.[7] From April 1986 to July 1986, Arnett filed several partial summary judgment motions, a motion for an evidentiary hearing, and a motion for discovery. In response, the State filed two separate cross motions for partial summary judgment.

On February 25, 1987, respondent ruled on fourteen of Arnett's sixteen claims. Respondent ruled for Arnett on several claims related to his sentencing, including ineffective assistance of counsel, and set the death sentence aside. Arnett's claim that his 1976 confession -- which formed the basis of his conviction -- was coerced was not addressed by any summary judgment motion, and accordingly the court ordered that an evidentiary hearing be held. *Arnett v. Ricketts*, 665 F. Supp. 1437, 1440-46 (D. Ariz. 1987). On March 30, 1987, over the objection of Arnett's counsel, respondent granted a motion by the State to stay the federal habeas proceeding to allow a habeas proceeding in state court to go forward.

Nineteen months later, following affirmance by the Arizona Supreme Court of Arnett's conviction and death sentence, the State asked respondent to lift the stay of the federal habeas

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[7] The procedural history of *Arnett* before November, 1985 is described in Appendix A, at 9a.

proceeding, and moved for reconsideration of the February 25, 1987 order. In the alternative, the State also sought permission to pursue an interlocutory appeal of the court's order under 28 U.S.C. § 1292(b) (1988). On November 28, 1988, the court vacated the earlier stay of proceedings, but denied the State's additional requests. And consistent with its earlier findings, the court granted Arnett's motion to depose various individuals to prepare for the evidentiary hearing on the allegations of involuntary confession.

On July 12, 1990, while the parties were still conducting discovery, the case was reassigned to a newly-appointed judge. On August 24, 1990, respondent scheduled an evidentiary hearing for October 29, 1990, but that date was subsequently vacated to allow further discovery and clarify a number of evidentiary issues. At status conferences on October 12, 1990 and November 26, 1990, and at a December 6, 1990 preliminary hearing, the parties and respondent discussed issues involving discovery and presentation of evidence. Arnett also filed with the court seven videotaped depositions relating to Arnett's allegedly coerced confession. Respondent noted that it would review the tapes for admissibility and ordered supplemental briefing concerning the admissibility of evidence.

On September 27, 1991, the court granted Arnett's request to retain an expert witness. On January 13, 1992, respondent held a status conference at which respondent inquired of the parties whether all of the claims raised in the first amended petition were addressed by the court's February 25, 1987 order. In the course of that conference, it became clear that additional discovery was necessary to prepare for the evidentiary hearing.

On April 23, 1992, Arnett filed an additional motion for partial summary judgment on certain claims in the amended petition. The State filed its response on May 13, 1992. Arnett filed his reply on July 2, 1992.

At a September 15, 1993 status conference, the admissibility of various exhibits was discussed at length, and the court scheduled an evidentiary hearing for November 16, 1993. Although the

State represented to respondent that all trial phase claims had been resolved in its favor, respondent pointed out that a claim regarding a jury instruction on malice had never been resolved or even addressed on the merits by the State. On September 28, 1993, the court ordered the State to file a motion for summary judgment on the remaining claim so that the entire case would be ripe for decision. On October 15, 1993, the State filed that motion, and on November 1, 1993, Arnett filed his response.

The evidentiary hearing on the issue of the allegedly coerced confession occupied five court days and was completed on December 2, 1993. The court set a final briefing schedule, to be completed in January 1994.

REASONS FOR DENYING THE WRIT

Petitioner urges this court to invoke the extraordinary remedy of mandamus for a purpose to which it is completely unsuited -- oversight of the exercise of judicial discretion in managing the increasingly heavy workload impinging on the federal courts. As the Chief Justice has stated, "we have gone from a system of under-utilized judicial resources 40 years ago to a system which today is straining at the seams to accommodate the case loads which are thrust upon it." *Chief Justice Discusses Changes in Justice System*, The Third Branch, Nov. 1993, at 7. The continued expansion of filings compresses the time available to hear cases and render decisions, and courts like respondent with especially heavy dockets face an endless challenge to their creativity in seeking to assure that matters are resolved with dispatch.

Habeas petitions in capital cases are among the most litigious and adversarial proceedings on the federal docket. Given the number and complexity of the claims, the numerous interim motions, requests for resources, and factual issues to be resolved, the task facing the district courts is arduous, even when viewed in isolation. That the task must be carried forward under the extreme case load pressures now prevailing, and with the constant possibility of new decisions that will expand, render moot, or put

pending issues in an entirely new light, makes it all the more difficult.

Within the constraints of the case load which it must carry, and in light of the particular issues presented in the cases whose handling is challenged, respondent has moved expeditiously in resolving the death penalty habeas corpus cases presented to it, including those specifically referenced by the State. It has also shown substantial initiative and innovation in finding ways to improve the functioning of the dual state-federal collateral review process mandated by law.

As this Court has observed, the use of mandamus "has the unfortunate consequence of making a district court judge a litigant." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). Its inappropriateness as a way of forcing courts to move cases more quickly is especially apparent in the context of federal habeas corpus cases, where the numerous and sometimes complex factual and procedural issues make any assessment of judicial timeliness a burdensome endeavor.

For all of these reasons, the State's petition should be denied.

I. THERE IS NO BASIS FOR AN ORDER OF MANDAMUS RELATING TO RESPONDENT'S HANDLING OF THE *CORRELL, VILLAFUERTE OR ARNETT* PETITIONS.

A. Mandamus Is An Exceptional Remedy Which Is Only Available To Limit A Court's Discretionary Control Of Its Calendar Where The Court Has Persistently Refused To Adjudicate A Matter Properly Before It

The remedy of mandamus, as applied to the conduct of a federal judge, is a "drastic one, to be invoked only in extraordinary situations." *Allied Chemical Corp.*, 449 U.S. at 34. Its application has been limited to confining "an inferior court to a lawful exercise of its prescribed jurisdiction or to compel[ling] it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

In general, mandamus is available only where there is a "clear and indisputable" right to the relief sought, and the party seeking it has "no other adequate means to attain the relief [it] desires." *Allied Chemical Corp.*, 449 U.S. at 35 (quotation marks omitted). It is not an appropriate vehicle for reviewing matters committed to a judge's discretion, because "[w]here a matter is committed to the discretion [of a district court], it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Id.* at 36 (quoting *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666 (1978) (plurality opinion)).

Fifteen years ago, in reversing a grant of mandamus directing a district court to accelerate its handling of a particular matter, a plurality of this Court noted that the heavy case loads handled by federal judges, imposing "competing demands on [judges'] time for matters properly within [their] jurisdiction and . . . inevitable scheduling difficulties because of the unavailability of lawyers, parties, and witnesses," require that judges have "a wide latitude in setting [their] own calendar[s]." *Will*, 437 U.S. at 665.[8] *Accord United States v. Taylor*, 487 U.S. 326, 343 (1988); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701, 707 (1927). In view of this broad discretion, mandamus directed to the speed

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[8] Competition for the time of federal district court judges has increased dramatically since *Will v. Calvert Ins. Co.* In the District of Arizona, for example, there has been an increase of 141 cases per judge, from 421 to 562, between 1978 and 1992. The 1992 figures placed respondent seventh in the United States and second in the Ninth Circuit in caseload per judge. *See* Administrative Office of the United States Courts, Management Statistics for United States Courts, at 100 (1978) ("1978 Rep."); Administrative Office of the United States Courts, Federal Court Management Statistics, at 126 (1992) ("1992 Rep.").

This increase pales, however, when compared with the rate of increase in new filings of civil prisoner petitions, which in 1992 in the District of Arizona exceeded new filings of civil prisoner petitions in 1978 by almost fivefold. *See* 1978 Rep. at 100 (reflecting 266 civil prisoner petitions filed in 1978); 1992 Rep. at 126 (reflecting 1316 civil prisoner petitions filed in 1992).

with which a court acts is reserved for exceptional situations where a court's "undue delay is tantamount to failure to exercise jurisdiction." 16 Charles A. Wright, *et al.*, *Federal Practice and Procedure*, § 3933, at 223 (1977). Unless the court "obstinately refuses to adjudicate a matter properly before it" -- thus failing to "'exercise the jurisdiction of review given by law'" -- delays in the handling of a case cannot be addressed by mandamus. *Will*, 437 U.S. at 661-662, 666 (citations omitted).

This Court's decision in *In re Blodgett*, 112 S.Ct. 674 (1992) -- denying mandamus -- is not to the contrary.[9] In that case, the court of appeals granted an indefinite stay of execution in March 1989, heard argument in June 1989, and took no further action of any kind until February 1991 -- 23 months after it issued its stay and 20 months after oral argument.[10] Even then, the court of appeals only acknowledged the developments which had occurred in the case, requested an update on the status of a state court petition for collateral relief which had been filed seven months earlier, and stated that the case was no longer under submission. Following denial of the state court petition for collateral relief, the court of appeals on August 7, 1991 granted petitioner's motion to

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[9] Nor does 28 U.S.C. § 1657, creating a statutory priority for habeas petitions, support a different result. That statute recognizes four separate categories of civil cases requiring expedition, including "any other action if good cause is shown"; sets no time limits for or priorities among the four classes; and generally recognizes that "each court of the United States shall determine the order in which civil actions are heard and determined." 28 U.S.C. § 1657(a). Thus, Congress recognized and approved the exercise of discretion necessarily vested in "each court" with respect to scheduling.

[10] In failing to take any action during this time period, the court ignored three separate motions filed in January, April and September of 1990 to withdraw certain issues to allow petitioner's filing of an additional state court petition for collateral relief. In addition, the Washington Attorney General sent letters to the panel in April and October 1990, inquiring about the status of the case, but neither letter was answered. 112 S.Ct. at 675.

proceed *pro se* with a third federal petition for habeas corpus, left its March 1989 stay in effect, and indicated that it would take no further action until the district court ruled on the new federal petition.

This Court, presented with an original petition for mandamus challenging the actions of the Ninth Circuit, found "grounds to question both the necessity and the propriety of the Ninth Circuit's order of August 7, 1991," but concluded that the requested relief was foreclosed by the State's failure to lodge its objection to that order initially with the court of appeals. 112 S.Ct. at 676. In reaching this result, the Court stated the following rule:

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

Id.

By its terms, this directive imposes on district courts the duty to exercise their discretion to insure that consideration of the issues presented is *both* expeditious and careful.[11] For

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[11] While "[f]ederal courts are not forums in which to relitigate state trials," they must, in the context of habeas corpus review, "give nonfrivolous claims of constitutional error the careful attention that they deserve." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). The task of providing expeditious but genuine review of the numerous claims often raised by habeas petitioners facing the death penalty is a tedious and difficult one, and demands careful consideration of the trial record and, often, receipt of additional evidence. *See, e.g.*, Rules Governing Section 2254 Cases in the United States District Courts, Rule 8 (requiring district court to determine whether an evidentiary hearing is required on habeas petitions); *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992)(in death penalty cases, even where Court's cases preclude review of the merits of successive, abusive or procedurally defaulted claims, petitioner may require the federal court to hear the merits upon a

mandamus to be appropriate based on an alleged breach of this duty, it must be clear and indisputable under the circumstances that the court has failed "to ensure a prompt resolution of the matter." As with any petition for mandamus, this will be true only in the exceptional case, where unique circumstances make unmistakable the court's disregard of the duty upon it.

Assuming *arguendo* that mandamus would have been appropriate in *Blodgett* but for the State's failure to object to the court of appeals' order, critical characteristics of that case show that it is no precedent for using mandamus as a general remedy to address perceived judicial tardiness in handling initial habeas corpus petitions. Perhaps most obviously, while judicial delay provides the backdrop of the challenged conduct at issue in *Blodgett*, the mandamus petition there challenged a particular order of the Ninth Circuit. *See Campbell v. Blodgett,* 940 F.2d 549 (9th Cir. 1991). The issue thus posed was whether, in context, the August 7, 1991 order exceeded the appellate court's authority -- in part by retaining jurisdiction over a case that was no longer, in any substantive respect, pending before it. 112 S.Ct. at 675-676. This focus of the issue in *Blodgett* thus distinguishes that case sharply from those where the claim is that a judge has simply taken too long, overall, to resolve particular petitions pending before him.

It is also noteworthy that *Blodgett* involved delay in handling the appeal of denials of successive habeas petitions, not the district court's resolution of an initial petition, as is involved here.

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showing of "actual innocence" of the crime, or inapplicability of the death penalty; concluding, "in view of all of the other evidence in the record," that petitioner had not established "actual innocence of death"); *Kimmelman v. Morrison*, 477 U.S. 365 (1986)("It will generally be appropriate for a reviewing court to assess counsel's overall performance in the case in order to determine whether . . . counsel rendered reasonable professional assistance"); *Zant v. Stephens*, 462 U.S. 862, 883, 885 (1983) (habeas petitions in capital cases require "careful scrutiny" since the death penalty is "qualitatively different" than other sentences and requires greater reliability).

This Court has made clear that second and successive petitions for habeas corpus "present a different issue" from that raised by an initial petition, and that a greater degree of expedition in that context may well be appropriate. *Blodgett*, 112 S.Ct. at 676; *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). The potential for abuse inherent in such repetitive petitions dictates that they be scrutinized with a critical eye lest they become simply a means of delay. *See McCleskey v. Zant*, 111 S.Ct. 1454, 1467-70 (1991). Such decisions limiting the habeas remedy rest on the premise that claims should have been presented initially, and do not suggest that meaningful review is simply unavailable if it takes too long. [12] Moreover, an appellate court, as in *Blodgett*, has less reason to engage in extended proceedings because it has a duty to affirm if the court below is correct on the law and its factual findings are not clearly erroneous. *Amadeo v. Zant*, 486 U.S. 214, 223 (1988). Respondent is not authorized to provide appellate-style review to the initial petitions pending before it.

In sum, the use of mandamus to abrogate a court's discretion to control its docket and to reconcile expedition with fairness in

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[12] While this Court has discussed at length and formulated principles to address the potential for delay and abuse inherent in second and successive habeas petitions, it has not wavered from the proposition that parties have a right to full and fair consideration of properly preserved and presented federal constitutional claims raised on an initial habeas corpus petition filed in federal court. *See, e.g., Vasquez v. Hillery*, 474 U.S. 254, 260 (1986)(writ of habeas corpus has "throughout its history" contemplated "meaningful federal review of constitutional claims"); *Bounds v. Smith*, 430 U.S. 817, 827 (1977) (habeas corpus petitions "are of fundamental importance . . . in our constitutional scheme because they directly protect our most valued rights") (quotations omitted); *Wingo v. Wedding*, 418 U.S. 461, 468 (1974)("root principle [of habeas corpus] is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment") (quotations omitted).

particular cases is without support in *Blodgett* or any other decision of this Court.[13]

B. Petitioner Has Failed To Show Any Refusal Or Unreasonable Delay By The District Court In Exercising Its Jurisdiction To Resolve The Habeas Corpus Petitions In Issue

A brief consideration of the cases at issue here demonstrates that no unreasonable delay -- and certainly none remediable by

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[13] In addition to *Blodgett*, petitioners mischaracterize other holdings of this Court relating to the availability of mandamus. Faced with prayers for mandamus based on claims of "'persistent disregard' of the rules of this Court" (Pet. at 14), the Court has exhibited the same restraint that has marked its decisions focused on judicial delay. *See Will v. United States*, 389 U.S. 90 (1967) (willful disobedience to this Court's rules would not be inferred from district court's orders tailored to the needs of the case). And in those cases where mandamus has issued based on a court's refusal to act, ordinarily there has been an order of the lower court disposing of the case in an inappropriate way which denies effective appellate review, *see Insurance Co. v. Comstock*, 83 U.S. (16 Wall.) 258, 270 (1873)(mandamus would be appropriate to direct court of appeals to decide case improperly dismissed for lack of jurisdiction); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) (mandamus can issue where district court entered an order remanding diversity case to state court on a ground -- docket congestion -- not authorized by statute), or other extreme circumstances making the breach of duty unmistakable. *See La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (mandamus issued where district court entered orders referring two cases for trial before a master because of docket congestion; trial court's orders abused its reference authority under court rules and "amount[ed] to little less than an abdication of the judicial function depriving the parties of [a] trial[] before the court on the basic issues involved in the litigation").

The State's intimations to the contrary (Pet. at 14 n.5), the Court has never issued mandamus to a court that "is doing the best it can with its current case load," imposing upon it a rigid set of time limits applicable to an entire class of cases and without regard to the impact on the rest of the lower court's docket.

mandamus -- occurred with regard to any of them. Contrary to the State's assertion of a refusal to act, the record, in each case, reflects a steady progression of events toward ultimate resolution by the court.

The State first complains generally about the time that has elapsed since the petitions in *Correll* and *Arnett* were filed. (Pet. at 11). As a preliminary matter, the issue for the Ninth Circuit to decide on the State's petition was whether the records in those cases clearly demonstrated a basis for directing specific action by the court at the time the relief was sought. It did not confer upon the appellate court a roving commission to scrutinize years of procedural history.

Rather than address specific examples of delay in the individual cases, the State relies on the circular logic that motions not decided within the arbitrary time limits the State now seeks to have imposed are therefore untimely. However, each petition for habeas corpus presents particular issues and demands upon the court's time, which must be reconciled with all the other obligations facing the court. That some decisions are not made within the time limits the State suggests does not establish an abdication of respondent's duties.[14]

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[14] None of the court of appeals cases cited by the State (Pet. at 14 n.5) supports mandamus in this case. *Johnson v. Rogers*, 917 F.2d 1283 (10th Cir. 1990), for example, involved the fourteen-month failure of a court to hear a prisoner's petition challenging a substantial change in his presumptive parole date. There were no stays in that case, and the State promptly filed a response making the entire case ripe for an immediate hearing. Similarly, in *McClellan v. Young*, 421 F.2d 690, 691 (6th Cir. 1970), the court of appeals issued a writ of mandamus to the district court where the sole issue before the district court was one that had already been answered by the court of appeals. In *Jones v. Shell*, 572 F.2d 1278 (8th Cir. 1978), mandamus issued where the district court failed to carry out the court of appeals' mandate on remand by dismissing the petition rather than requiring the State to file a responsive pleading as required by the court of appeals' decision.

Further, the State is substantially responsible for much of the delay of which it complains. It has itself moved for and received lengthy stays of the proceedings.[15] The State has also pursued what can fairly be termed a piecemeal approach to defense of the petitions, filing a series of partial summary judgment motions that did not fully address the claims advanced. And it has, at times, been painfully slow to advise the court of developments outside the proceeding which would have allowed the action before the court to move forward.

The most significant delay in ruling on a motion occurred in *Correll* during the period immediately following the case's transfer to a new judge in July 1990. But after the State finally brought to the court's attention the fact that the sentencing phase claims in the case could now proceed -- fourteen months after this Court issued its decisions in *Walton* and *Jeffers* -- respondent promptly ordered a status conference. At that October 1991 conference, the State agreed with respondent that the best way to resolve the numerous claims in the case was for Correll to file an amended petition, and for the State to file one summary judgment motion addressing all of Correll's claims. That motion resulted in procedural default findings on approximately half of Correll's claims, which in turn required further briefing on cause and prejudice and, if the State desires, briefing on the merits. Briefing has subsequently proceeded on the cause and prejudice issues.

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[15] In *Arnett*, over the objections of Arnett's counsel, the State received a stay of the entire proceeding on March 6, 1987. It did not request that the stay be lifted until nineteen months later. After that stay was lifted, rather than respond on the merits to Arnett's petition as previously ordered, the State again sought to stay the proceeding and to pursue an interlocutory appeal. Those motions were denied.

In *Correll*, the State also requested a stay of the entire proceeding on June 14, 1989, but the court granted the stay only as to the sentencing phase claims, which were affected by *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), *cert denied*, 497 U.S. 1031 (1990).

Villafuerte's petition was disposed of on September 2, 1993 in an eighty-one-page opinion addressing twenty-one claims on the merits and on procedural default grounds. The State implies that respondent ignored the case following oral argument on the State's summary judgment motion on March 16, 1992. Pet. at 11. However, from March 16, 1992 until respondent vacated the stay of execution on September 29, 1993, respondent resolved the preliminary but time-consuming issues of procedural default, allowed Villafuerte an opportunity to demonstrate cause and prejudice (and the State an opportunity to respond), and denied Villafuerte's motion for reconsideration.

In *Arnett*, the court resolved much of the habeas petition in 1987 by granting summary judgment to the State on some of Arnett's claims, granting him a resentencing because of numerous defects in the sentencing proceedings, and ordering an evidentiary hearing on his claim of involuntary confession -- a claim neither the State nor Arnett had addressed in a summary judgment motion. Since the February 1987 order in *Arnett*, the State has taken no initiative to seek resolution of the pending issues in the case but has acted only in response to actions by Arnett or the court.[16] The State recently filed a motion for summary judgment on the only remaining claim in *Arnett*, an alleged improper jury instruction on malice, but only at the request of respondent.[17]

Also in *Arnett*, preparation for the evidentiary hearing on the involuntary confession claim based on the conditions of incarceration has involved attempts to locate, interview, and depose prisoners and prison officials who were at the prison seventeen years ago, other discovery relating to the conditions of

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[16] The State filed cross-motions for summary judgment in response to Arnett's summary judgment motions.

[17] Similarly, respondent notified the State at a January 13, 1992 status conference that it still had not responded to the four claims raised in Arnett's amended petition filed on November 28, 1989. The State agreed at the conference to file a cross motion for summary judgment on those claims.

the prison at that time, and discovery of expert witnesses regarding Arnett's mental state. At the January 13, 1992 status conference, it became clear that the parties had not completed discovery and could not estimate how long an evidentiary hearing would take. The State's mandamus petition to the Ninth Circuit was the first occasion on which the State objected to delay in conducting the evidentiary hearing.

The State's selection of these three cases ignores respondent's actual record in disposing of capital habeas petitions. In the months before the petition for mandamus was filed in the court of appeals, respondent resolved six capital habeas petitions, either on the merits or by extensive opinions sending them back to state court for further proceedings.[18] Moreover, respondent's record

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[18] On February 23, 1993, the court denied a next friend petition, *Brewer v. Lewis*, No. 93-341-PHX-RGS, attempting to stay an execution. The petition had been filed just five days before respondent's decision, and respondent was required to devote extensive time and resources in order to resolve the petition promptly. Brewer was subsequently executed.

On November 19, 1992, in *Hooper v. Lewis*, No. 91-1495-PHX-SMM, respondent *sua sponte* dismissed a petition rather than hold the case in abeyance while Hooper returned to state court, as the State requested in a motion filed on October 27, 1992. The court found it unlikely that the State would prematurely seek an execution or that the Arizona courts would fail to adequately review Hooper's claims. Similarly, in *Bracy v. Lewis*, No. 90-1824-PHX-SMM, respondent dismissed the petition without prejudice on November 19, 1992, less than one month after Bracy notified respondent that he had commenced a state collateral proceeding.

In *Beaty v. Lewis*, No. 92-611-PHX-SMM, Beaty filed a request for stay of execution on April 2, 1992. After the State objected to this initial petition, the court issued an expedited briefing schedule and on May 7, 1992 granted a stay of execution for only 45 days while Beaty attempted to comply with state court procedures. On June 26, 1992, after Beaty had begun to follow state court procedures, the court dismissed the petition.

as a whole is completely incompatible with petitioner's claim that the court has refused to decide capital habeas corpus petitions. The Ninth Circuit properly recognized that the State failed remotely to meet its burden to justify a writ of mandamus with regard to *Correll*, *Villafuerte*, and *Arnett*; and the State has failed entirely to make its case for intervention by this Court.

II. THIS COURT SHOULD NOT GRANT REVIEW FOR THE PURPOSE OF PROMULGATING PROSPECTIVE TIME-LIMITS ON THE HANDLING OF FEDERAL HABEAS CORPUS CASES

Having failed to establish any unauthorized action or refusal to adjudicate a matter properly before it, as is necessary to support mandamus in an individual case, petitioners nonetheless urge this Court to take even more sweeping action. They argue that the Court should use these cases as a jurisdictional "vehicle . . . to force the Court of Appeals to exercise its supervisorial authority, and establish guidelines to enforce this Court's mandate in [*In re] Blodgett*[, 112 S.Ct. 674 (1992)]." Pet. Reply at 3. Petitioners' proposal that the Court "establish a 120-day time limit for ruling on dispositive motions, a 30-day time limit for ruling on procedural motions, and a 180-day time limit for scheduling an evidentiary hearing" in habeas cases involving capital sentences, Pet. at 16, must be rejected as unsuited for consideration on either a writ of certiorari to the Ninth Circuit or a petition for mandamus directed to this Court. In addition, it is a bad idea.

In *Harding v. Lewis*, No. 92-209-TUC-ACM, petitioner filed a request for a stay of execution on March 27, 1992, and on April 4, 1992, the day of the hearing, the court denied the stay of execution, dismissed the successive petition as abusive, denied a certificate of probable cause, and forwarded all materials in an expedited fashion to the Ninth Circuit. Harding was executed by the State on April 6, 1992.

In *Clark v. Lewis*, No. 84-350-TUC-WDB, petitioner requested that his case be re-opened and filed a successive petition on April 11, 1993. The next day, the court denied a stay of execution and dismissed the petition. Clark was executed in August 1993.

Insofar as the State requested the Ninth Circuit -- and now requests this Court -- to establish general time limitations on judicial action reaching beyond any particular case, there is no clear and indisputable right to the relief sought. Because the promulgation of rules concerning the timely administration of justice plainly involves an exercise of substantial discretion, the petition for mandamus is obviously without merit.

Further militating against the availability of mandamus, alternative avenues are available to pursue the sort of quasi-legislative proposal petitioners advance. Such an order directing that priority be given to particular categories of matters in accordance with a specified schedule would most appropriately be sought in the form of a federal statute, on the model of the federal Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, or a revision of the Federal Rules Governing Section 2254 Cases in the United States District Courts.[19] Alternatively, such relief might be sought

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[19] *See* 28 U.S.C. §§ 2071, 2072, 2074 (1988) (permitting the various federal courts to prescribe their own rules for "the conduct of their business," but generally "only after giving appropriate public notice and an opportunity for comment"; and requiring that rules proposed by this Court be transmitted for congressional review prior to their effective date); *Barker v. Wingo*, 407 U.S. 514, 523 (1972)(noting, in declining to impose specific time periods to implement constitutional guarantee of speedy trial, that "such a result would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts"); Sarah Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of Federal Courts*, 84 Colum. L. Rev. 1433, 1482-83 (1984) ("The announcement of a general rule in the course of the adjudication of a specific case or controversy provides less opportunity for the consideration of views from all relevant quarters, and is less likely to lead to comprehensive and integrated treatment of related problems . . . . These careful restrictions on the Court cast grave doubt on the claim that Congress implicitly granted the courts adjudicative authority to establish procedural rules free of both procedural restrictions and congressional oversight.") (footnotes omitted). *See also Miner v. Atlass*, 363 U.S. 641, 645 (1960)(rulemaking procedures were "designed

from the judicial council of the circuit, which has the power to "make all necessary and appropriate orders for the effective and expeditious administration of justice" within the circuit. 28 U.S.C. § 332(d)(1) (1988).[20]

Even if properly proposed, however, a set of deadlines such as petitioners suggest would be imprudent for several reasons. The excessive case loads now carried by the federal courts make it more critical than ever that judges be allowed wide latitude in controlling their own calendars.[21] In addition, petitioner's

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to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords"); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 15 (1941) (Congress understood the value of reserving an opportunity to veto proposed rules before their effective date).

[20] As noted by Justice Harlan in his concurring opinion in *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 98 (1970), the "Judicial Council . . . was designed as an actual participant in the management of the judicial work of the circuit." Thus, it is empowered to hold hearings, take sworn testimony, and issue subpoenas and subpoenas duces tecum related to the administration of justice within the circuit. 28 U.S.C. § 332(d)(1). All judicial officers are bound by statute to obey the council's orders, or risk institution of contempt proceedings. 28 U.S.C. § 332(d)(2). The judicial council thus has the power to make the sort of factual inquiry required to determine the desirability of imposing a schedule for adjudication of habeas petitions in capital cases, and to compel compliance with such a schedule if one be properly put in place.

[21] In 1992, criminal cases represented almost one fourth of respondent's new filings. *See* 1992 Rep. at 126. Those cases, of course, required prompt adjudication in accordance with the provisions of the Speedy Trial Act. In the same time period, prisoner petitions constituted almost one third of all new filings. *Id.* Respondent in 1992 experienced the second highest number of new prisoner petition filings of any district in the nation; the only district with higher numbers was the Middle District of Florida, which has three more judgeships than respondent. *Id.* With

proposal fails to take into account the fact-intensive nature of habeas review, and the wide variety in size of records and seriousness of the issues raised.

As a result, any attempt to confine capital habeas review inflexibly to particular narrow time limits would have two unfortunate probable consequences. One would be the disruption of the court's handling of other urgent business, including pending criminal matters involving incarcerated defendants whose guilt has yet to be determined, temporary restraining orders and injunctions, and issues of public concern demanding a prompt resolution.[22] The second might well be the failure to give full and appropriate consideration to federal constitutional issues raised in more difficult habeas cases.

The allowance of exceptions to the time limits upon a showing of unusual circumstances would not make the proposal viable. Such an approach would consume additional judicial resources in determining the appropriateness of time limits, and if made reviewable, would make the district court judge a habitual litigant. *See Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). Judges would face the choice of meeting the presumptive

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over 100 inmates presently on Arizona's death row, the burden placed on respondent by capital habeas petitions is unlikely to decrease any time soon.

[22] For example, in *Arizonians for Fair Representation v. Symington*, 828 F. Supp. 684 (D. Ariz. 1992), because of a legislative impasse in redistricting Arizona's congressional districts, respondent was forced to expend significant resources in a compressed time period to formulate a redistricting plan. In less than three months, respondent, sitting as a three judge court, heard and read the statements of numerous expert and lay witnesses, considered and ruled on a barrage of pre-trial motions on procedural and evidentiary issues, held trial, considered and ruled on a variety of post trial motions, and issued a written opinion and order adopting a redistricting plan. This case, the decision in which was summarily affirmed by this Court, 113 S. Ct. 1573 (1993), occupied substantial time which might have been devoted to the three matters which are the focus of the State's petition.

deadline or justifying their failure to do so in collateral litigation. *See Ortega Rodriguez v. United States*, 113 S.Ct. 1199, 1206 (1993) (exercise of supervisory authority would not serve the interests of efficient judicial operations, where it would result in a "flurry of extraneous matters . . . divert[ing] the court's attention from the merits of the case").

Petitioners' proposal for uniform mandatory time limits is also unnecessary, and completely ignores the substantial steps that have already been taken by respondent to expedite the handling of death penalty cases. First, the court has assigned a judge to serve as the death penalty coordinator for all capital habeas corpus petitions. When petitions are filed, the coordinator appoints counsel as soon as possible, and issues an order that sets a briefing schedule designed to prevent numerous delaying amendments.[23] That order also requires the State to file an answer as well as any additional responses, such as summary judgment motions, by a date certain after the amended petition is filed.

Second, the court has recently been engaged in a dialogue with Arizona state court judges to establish procedures for more efficiently resolving post-conviction proceedings in capital cases. *See* Appendix B, Letter from the Hon. Stephen M. McNamee to the Hon. Robert J. Corcoran and the Hon. Ronald S. Reinstein, Sept. 22, 1993. Among the proposals being discussed are establishing a central repository for all records and other pertinent material in capital cases, modification of case management, and amendment of Rule 32 of the Arizona Rules of Criminal Procedure (governing preclusion), the application of which often

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[23] Under respondent's order, habeas corpus petitioners are allowed time to research and investigate their claims before filing an amended petition. However, when the amended petition is filed, the order states that the petitioner will be presumed to have deliberately waived his right to complain of any constitutional errors or deprivations other than those set forth in his amended petition.

causes respondent considerable difficulty in resolving State summary judgment motions alleging procedural default.[24]

Thus, in a fundamental sense, petitioners' real complaint concerns the existence of the federal habeas remedy in the first place, rather than any overall abuse of the system resulting from undue delay. The unavoidable consequences of Congress's decision to provide such review -- and of the holdings of this Court insuring that the writ is preserved as a meaningful remedy -- are that federal habeas proceedings will delay the "finality" of state death sentences, thus occasioning additional costs to the State and compromising to varying degree the "orderly" and effective enforcement of state death penalty laws, the public's confidence in the authoritativeness of those laws, the deterrent effect of death sentences, and the "comity" between state and federal judges. As stated in *McCleskey v. Zant*, 111 S.Ct. 1454, 1469 (1991), the "federal writ of habeas corpus overrides all these considerations, essential as they are to the rule of law, when a petitioner raises a meritorious constitutional claim in a proper manner in a habeas petition." That remedy can be effective only where the federal court is allowed the time and the discretion to provide the review that is appropriate in the individual case. *Cf. Barker v. Wingo*, 407 U.S. 514 (1972) ("We cannot definitively say how long is too long in a system where justice is supposed to be swift but deliberate"; accordingly, constitutional right to speedy trial must be gauged on an "ad hoc" basis).

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[24] In addition, in July 1991, the Ninth Circuit Judicial Council's Death Penalty Task Force, after significant work by judges and practitioners in the circuit, published a "Capital Punishment Handbook" to assist judges and law clerks in dealing with capital habeas petitions.

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

PROCEDURAL HISTORY OF CORRELL V. LEWIS, VILLAFUERTE V. LEWIS AND ARNETT V. LEWIS*

I. CORRELL v. LEWIS

DATE	DESCRIPTION OF EVENT
9/15/87	-- Correll files a preliminary petition for writ of habeas corpus, an application for stay of execution and a motion for appointment of counsel.
9/18/87	-- The district court issues an order staying Correll's execution.
10/2/87	-- The court appoints two attorneys to represent Correll **and orders the State to file a response within 40 days from the date of service of the amended petition.**
1/7/88	-- The court grants Correll's request for leave to file an amended petition **and orders that the State file a response no later than 30 days after filing the amended petition.** (Due to a clerical error at the court, the State did not receive copies of the October 2, 1987 or January 7, 1988 orders.)
2/24/88	-- Correll files the amended petition for writ of habeas corpus **and serves a copy on the State.**
1/17/89	**-- The court orders the parties to file written status reports regarding measures necessary to bring the case to issue.**
2/3/89	**-- Correll files a written status report and an application for the entry of default.**

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* Information set forth in bold face was not referenced in the State's petition for certiorari.

DATE	DESCRIPTION OF EVENT
2/8/89	**– Default is entered by the clerk of the district court.**
2/14/89	**– The State files a motion to set aside the entry of default.**
2/27/89	**– The court issues an order setting aside the entry of default and orders the State to file a response to the amended petition.**
4/10/89	-- The State files a motion to dismiss the amended petition on the ground that Correll did not exhaust remedies available in state court.
4/27/89	**– Correll files his response to the State's motion to dismiss.**
5/8/89	**– The State files its reply to Correll's response.**
6/5/89	-- The court denies the State's motion to dismiss and orders the State to file a response to the petition.
6/14/89	-- **The State moves the court** to stay further proceedings in light of *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (holding application of sentencing provision of Arizona's death penalty statute unconstitutional).
7/21/89	-- The court grants the State's motion to stay the proceedings related to Correll's sentencing claims, but orders the proceedings relating to remainder of the claims to continue. **The court orders the State to file a response by August 20, 1989.**
9/7/89	-- The State files two separate motions for summary judgment or alternatively for dismissal.

DATE	DESCRIPTION OF EVENT
9/28/89	**– Correll files a motion to strike the State's partial summary judgment motions and for an entry of default against the State for failure to file a Rule 5 answer to the petition.**
10/3/89	**– The State files a response to Correll's motion to strike and for entry of default.**
10/30/89	**– The court denies Correll's motions to strike and for default.**
11/15/89	-- Correll files a response to the State's summary judgment motions.
12/4/89	-- The State files its reply.
2/10/90	-- Correll files a second request to amend petition with two additional claims.
2/23/90	-- The State files an opposition to Correll's request to amend.
3/7/90	-- Correll files his reply.
3/14/90	-- The court grants Correll's request to amend the petition.
4/2/90	-- The State files a separate summary judgment motion on the newly added claims.
5/7/90	**– Correll files a response to the State's motion for summary judgment.**
7/13/90	**– The case is reassigned to newly appointed District Court Judge Stephen McNamee.**
7/19/90	**– The Court grants Correll's motion for appointment of an investigator.**

DATE — DESCRIPTION OF EVENT

9/6/91 — The State files a brief request for a ruling in the case, citing *Walton v. Arizona*, 497 U.S. 639 (1990) and *Lewis v. Jeffers*, 497 U.S. 764 (1990).

9/27/91 -- The court orders a status conference for October 4, 1991.

10/4/91 -- The court holds a status conference.

1. The State informs the court of the procedural history of the case and notes that the State had filed a response to the guilt phase claims, but had not yet responded to sentencing phase issues presented in Correll's petition.

2. The State informs the court that it is appropriate to allow Correll to amend his petition.

3. The State agrees that the most efficient approach would be to vacate the other previously filed motions for summary judgment and to proceed with one motion.

4. The court vacates the previously issued stay of proceedings regarding Correll's sentencing claims and issues a briefing schedule.

5. The court sets a status conference for May 11, 1992.

12/6/91 -- Correll files the third amended petition for writ of habeas corpus, **which raises approximately 53 separate claims.**

2/14/92 -- The State files a new motion for summary judgment.

DATE	DESCRIPTION OF EVENT
3/6/92	**-- The court grants Correll's motion for an extension of time to respond to the motion for summary judgment.**
5/15/92	-- Correll files his response to the State's summary judgment motion and moves to expand the record.
5/29/92	-- The State files its reply in support of its summary judgment motion, **its response to Correll's motion to expand the record, and a motion for an extension of time to respond to any future arguments by Correll regarding cause and prejudice. (The State's motion for an extension of time also requested additional time to address the merits of any defaulted claims for which Correll could demonstrate cause and prejudice).**
6/19/92	-- The court hears oral argument on the motion for summary judgment; the court states that it will enter a formal written order.
3/23/93	-- The State files a request for a ruling on its summary judgment motion.
7/1/93	-- The State files a petition for Writ of Mandamus with the Court of Appeals for the Ninth Circuit.
7/22/93	**-- The court files a 39-page order that:**
	1. resolves various technical defects with the presentation of claims in the amended petition and related pleadings;
	2. denies Correll's motion to expand the record;
	3. finds 26 of Correll's claims procedurally barred;

DATE DESCRIPTION OF EVENT

4. allows Correll **30 days** to submit any arguments demonstrating cause and prejudice to overcome the findings of default;

5. **grants the State's May 29, 1992 motion for ~~additional time~~ to respond to any allegations of cause and prejudice submitted by Correll and to address the merits of certain claims;**

6. deems the State's motion for summary judgment to be no longer under advisement because of the outstanding issues of cause and prejudice.

8/31/93 -- The State files objections to respondent's order and contends that it was error to allow Correll additional time to demonstrate cause and prejudice.

9/13/93 -- Correll files his motion for reconsideration and showing of cause and prejudice.

10/18/93 – The court grants the State's motion for leave to accept the State's late filing of responses to Correll's motions for reconsideration and showing of cause and prejudice. The State's failure to submit additional briefing was excused by the court based on an error in calendaring deadlines. The court again notes that the State's summary judgment motion is no longer ripe given that the motion does not address Correll's claims of cause and prejudice.

11/1/93 – The State files its response to Correll's motion for reconsideration and showing of cause and prejudice.

II. VILLAFUERTE v. LEWIS

DATE	DESCRIPTION
5/9/91	-- Villafuerte files a preliminary petition for writ of habeas corpus, an application for stay of execution, and a motion for appointment of counsel.
5/14/91	-- The court issues a stay of execution and appoints counsel.
6/26/91	**– The court grants Villafuerte's motion for extension of time to file an amended petition.**
7/19/91	-- Villafuerte files an amended petition.
8/26/91	-- The State files a motion for summary judgment.
10/11/91	**– Villafuerte files a motion to expand the record and a request for an evidentiary hearing.**
10/17/91	-- Villafuerte files a response to the State's summary judgment motion.
10/29/91	**– The court finds Villafuerte's request to expand the record moot.**
11/7/91	**– The State files a response to Villafuerte's motion for an evidentiary hearing and a reply brief in support of its summary judgment motion.**
11/14/91	**– The court schedules oral argument on the State's summary judgment motion for January 13, 1992.**
11/27/91	**– The State files transcripts from state court proceedings.**
12/10/91	**– To force compliance with local rules, the court orders Villafuerte to file a statement of facts in support of his previously submitted response to the State's summary judgment motion. The**

DATE	DESCRIPTION OF EVENT
	court allows the State to amend its motion and schedules oral argument for March 16, 1992.
12/20/91	**-- Villafuerte files a statement of facts.**
3/16/92	-- The court hears oral argument on the State's motion for summary judgment and takes it under advisement.
7/17/92	**-- The State supplements the record to include the Arizona Supreme Court's order denying review of Villafuerte's post-conviction relief petition.**
8/3/92	**-- The court issues an order finding six claims procedurally barred and orders additional briefing by both parties on issues of cause and prejudice. The court dismisses without prejudice Villafuerte's motion for an evidentiary hearing.**
8/21/92	**-- Villafuerte moves for reconsideration of denial of his request for an evidentiary hearing (in lieu of a separate brief on issues of cause and prejudice).**
9/4/92	**-- The State files its opposition to Villafuerte's motions.**
10/15/92	**-- The State supplements its opposition.**
7/1/93	-- The State files a petition for Writ of Mandamus with the Court of Appeals for the Ninth Circuit.
7/9/93	-- The court denies reconsideration of its findings and dismissal of Correll's request for an evidentiary hearing, and grants summary judgment on the six claims found barred.

DATE	DESCRIPTION OF EVENT
9/29/93	-- The court issues an 81-page order denying Villafuerte all relief, granting the State's motion for summary judgment and vacating the previously issued stay of execution.

III. ARNETT v. LEWIS

DATE	DESCRIPTION
11/3/83	-- Arnett files a petition for writ of habeas corpus and stay of execution.
1/3/84	**– The State answers the petition.**
2/6/84	**– Arnett challenges the sufficiency of the State's Rule 5 answer.**
12/10/84	**– Arnett files a motion for discovery, including interrogatories and requests for production of documents and admissions.**
6/3/85	**– The court finds that some claims are not exhausted and dismisses the petition without prejudice.**
6/13/85	**– Arnett files a motion to amend or alter the judgment.**
10/4/85	**– The court grants Arnett's motion and vacates its June 3, 1985 order and vacates the judgment.**
11/22/85	**– After conducting an informal conference, the court grants in part Arnett's motion for discovery and *sua sponte* grants summary judgment for the State on several claims.**
4/9/86	-- Arnett files a motion for partial summary judgment.

5/12/86 -- **The State files a cross motion for partial summary judgment.**

7/86 -- Arnett files two additional motions for partial summary judgment, **a motion for an evidentiary hearing, and requests for discovery.**

7/30/86 -- **The State files a further cross motion for partial summary judgment.**

2/25/87 -- The court grants partial relief to Arnett on his summary judgment motions. The order sets aside Arnett's sentencing and allows an evidentiary hearing on the voluntariness of the confession on which his conviction was based. 665 F. Supp. 1437, 1440-1446.

-- **With respect to Arnett's sentencing phase claims, the court finds:**

1. A *Miranda* violation in connection with a psychiatric evaluation ordered by the State, the report of which was used at the sentencing hearing;

2. A *Miranda* violation resulting from actions by the probation officer who prepared the presentencing report;

3. A denial of confrontation at the sentencing;

4. A lack of competent proof of aggravation;

5. Ineffective assistance of counsel at the sentencing phase; and

6. The improper admission of an invalid California conviction.

-- **(The State did not seek summary judgment on Arnett's claim that his confession was coerced by the allegedly deplorable condition of his 1976 incarceration. *Id.* at 1446. Nor did it**

DATE	DESCRIPTION OF EVENT
	address Arnett's claim of an improper jury instruction on malice.)
3/6/87	-- The State seeks a stay of the proceedings pending conclusion of Arnett's state collateral proceedings.
3/19/87	-- Arnett files a response opposing the State's motion for a stay of the habeas proceedings.
3/30/87	-- **Over the objections of Arnett's counsel,** the court grants the State's request for a stay of all matters, including the evidentiary hearing.
7/29/88	-- The Supreme court of Arizona affirms Arnett's conviction and death sentence. *State v. Arnett*, 158 Ariz. 15, 760 P.2d 1064 (1988).
10/3/88	-- The State asks the court to lift the stay and grant a rehearing of its February 25, 1987 order, **or to allow the State to seek interlocutory appeal under 28 U.S.C. 1292(b) and issue a stay pending that appeal.**
11/1/88	-- Arnett files a response to the State's motion to grant a rehearing of the court's February 25, 1987 order and to appeal.
11/21/88	-- Arnett requests permission to amend his petition to include new issues recently decided by Arizona Supreme court.
11/28/88	-- The court vacates its previously issued stay of proceedings, **denies the State permission to pursue an interlocutory appeal and grants Arnett's motion to depose various individuals in preparation for the evidentiary hearing.** The court allows Arnett to amend his petition

DATE	DESCRIPTION OF EVENT
	with additional claims that were exhausted in State court.
8/29/89	**– The State files a motion to dismiss the petition.**
11/28/89	**– Arnett files an amended petition.**
7/12/90	**– The case is reassigned to newly appointed District Court Judge McNamee.**
8/24/90	**– The court schedules an evidentiary hearing for October 29, 1990.**
10/12/90	**– The court conducts a status conference regarding the manner in which the hearing would proceed and schedules a follow-up conference for November 26, 1990.**
11/26/90	**– The court holds a status conference and schedules a preliminary hearing for December 6, 1990.**
12/6/90	**– The court conducts a preliminary hearing: the parties discuss issues involving discovery and the presentation of evidence; Arnett files seven videotaped depositions relating to Arnett's allegedly coerced confession. The court states that it will review the depositions and orders supplemental hearing memoranda from the State in response to Arnett's memorandum on the admissibility of evidence.**
12/21/90	**– The State files its response to Arnett's memorandum regarding admissibility of evidence.**
1/25/91	**– Arnett files a reply to the State's response.**

DATE	DESCRIPTION OF EVENT
9/27/91	– The court grants Arnett's ex-parte request for additional resources including the appointment of an expert witnesses.
12/30/91	– The court schedules a status conference for January 13, 1992 regarding scheduling the evidentiary hearing.
1/13/92	– The court holds a status conference to discuss discovery and evidentiary issues, and to obtain information regarding the evidentiary hearing.

1. The court asks the parties how changes in case law would affect the court's February 25, 1987 order. In response, the State requests the opportunity to investigate any change in the case law that might affect the court's previous rulings in favor of Arnett.

2. In response to the court's questioning about claims raised in the amended petition filed on November 28, 1989, counsel for Arnett states that he is preparing a summary judgment motion on those issues. Counsel for the State states that he is not aware of the amended petition or whether the State had responded to the petition. At the request of the court, the State agrees to file a cross-motion for summary judgment on the additional claims.

3. The court asks the parties to determine whether any prior order had disposed of Arnett's claim regarding a jury instruction on malice because the court had not been able to locate any such decision.

4. The court questions the parties about how long the evidentiary hearings will take.

DATE	DESCRIPTION OF EVENT
	5. Both parties agree to allow depositions of any expert witnesses they expect to call.
4/16/92	**-- The court orders Arnett to file a statement of facts in connection with the filing of a partial summary judgment motion.**
4/23/92	-- Arnett files a further motion for partial summary judgments on the new claims in the amended petition filed on November 28, 1988.
5/13/92	-- The State files its response to Arnett's motion for partial summary judgment.
7/2/92	**-- Arnett files his reply.**
7/1/93	-- The State files a petition for Writ of Mandamus with the Court of Appeals for the Ninth Circuit.
9/3/93	**-- The court schedules a status conference for September 15, 1993.**
9/15/93	**-- The court holds a status conference: at which the admissibility of various exhibits is discussed,** and the court schedules an evidentiary hearing for November 16, 1993. **The court questions the State as to why they had not requested a summary judgment with respect to a jury instruction claim when the court's February 25, 1987 opinion pointed out that the State had not addressed the claim, and notes that case was never technically ripe for final resolution.**
9/28/93	**-- After reviewing the previously submitted videotaped depositions, the court issues an order admitting the remaining exhibits and depositions and authorizing subpoenas to conduct videotaped depositions of out-of-state**

DATE	DESCRIPTION OF EVENT
	witnesses. The court orders the State to file a motion for summary judgment on the remaining claim pertaining to the jury instructions on malice, and notes that the State's argument that the case is ripe for review is based on inaccurate assumptions rather than a thorough review of record.
10/15/93	**– The State files a motion for summary judgment on the malice instruction pursuant to the court's order.**
11/1/93	**– Arnett files his response.**
11/16-18, 11/23, 12/2/93	**– The court holds an evidentiary hearing on the issue of the allegedly coerced confession. The court sets a final briefing schedule, to be completed in January, 1994.**

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
United States Courthouse
230 North First Avenue
Phoenix, Arizona 85025

Stephen M. McNamee
United States District Judge

Telephone: 602-514-7016
FAX: 602-514-7173

September 22, 1993

Honorable Robert J. Corcoran
Supreme Court of Arizona
1501 West Washington
Phoenix, Arizona 85007-3229

Honorable Ronald S. Reinstein
Superior Court of Maricopa County
101 West Washington
Suite No. 514
Phoenix, Arizona 85003-2205

Dear Bob and Ron:

As we recently discussed, capital cases present significant judicial and administrative challenges to both state and federal courts. It is my hope that the enclosed summary of our informal discussion regarding these issues may be useful in implementing potential solutions to these problems and creating a more productive relationship between the state and federal judiciary.

Many of the problems associated with capital cases stem from the inordinate amount of time they require to achieve final resolution and from the often highly technical procedural path they travel through each judicial system.

One of our mutual concerns is to try to establish a series of procedures that will allow petitioners to exercise their rights while at the same time construct a framework for the orderly processing of capital cases. While still in the "thinking" stages, these concepts should serve as the basis for further dialogue between us.

I. CENTRALIZED CONTROL OF THE RECORD

The first suggestion is that we explore the feasibility of establishing a central depository or "library" for all records, exhibits, transcripts, and other pertinent materials in capital cases.

The depository would function through a clerk's office and would assist our courts in creating and maintaining a uniform case record. Counsel would have unlimited access to the records; however, they would be required to re-deposit the records at the conclusion of their involvement in the case. the records would then be available for subsequent counsel. As you are aware, it is not uncommon for a petitioner to have three or more counsel throughout these protracted proceedings.

Hopefully, this procedure would ensure that no portions of the record are lacking regardless of that forum the case may be in or when counsel became involved in the matter. Further, a central depository would place responsibility for the preservation oft he records on the individuals who utilized them and would eliminate the unnecessary expenditure of taxpayer dollars to reproduce the entire record repeatedly.

A central depository may also reduce the time new attorneys require the "get up to speed" on a case because they would no longer be required to expend valuable time assembling the record from prior counsel if it is still available. Moreover, centralization of the record would allow the courts to utilize a uniform numbering system for all documents and exhibits. In this manner, confusion would be eliminated and references to the record in state or federal orders would be identical. This system would

provide for a more efficient, accurate, and timely review of a petitioner's claims.

II. MODIFICATION OF CASE MANAGEMENT & AMENDMENT OF RULE 32

A. *Case Management*:

One of the problems that we hope to avoid by adopting uniform case management procedures is to reduce the "ping-pong" effect between the state and federal forums in capital cases. Our obvious goal is the effective review of claims within an orderly framework.

The "problem areas" associated with the management of capital cases can be grouped into three basic categories: The presentation of claims; judicial rulings or orders; and the procedural posture or forum in which the case should proceed.

1. Petitioners often present their claims in a confusing manner. Further, various methods i.e., numerical, alphabetical, or merely paragraph designations are used to separate allegations. The confusion is compounded through successive petitions which adopt, change, or modify overlapping claims. One suggested method of identifying claims in all state and federal collateral proceedings would be to adopt a uniform identification for claims. Further, I would suggest that all claims be grouped in two major categories: Guilt Phase Claims & Sentencing Phase Claims.

If a uniform numbering of claims were adopted, a petitioner's allegations of error would be "permanently" identifiable by one numerical designation throughout all state and federal proceedings. As the state post-conviction court would control these designations, it would also be effective to require that all additional Rule 32 petitions number claims as if continuing with the initial proceeding. For example, if the first petition raised claims 1-10 (guilt phase) and 1-5 (sentencing), a second petition should be numbered claims 11-16 (guilt) and 6-9 (sentencing).

If implemented this procedure would greatly reduce the confusion associated with successive petitions in both state and federal courts. It would allow for a more simplified determination of what were new/successive/or abusive claims. It would be especially helpful when our courts are reviewing petitions in light of Rule 32.2 (procedural default) or *McCleskey v. Zant*, 111 S.Ct. 1454 (1991)(abuse of the writ). Also, it would help to make petitions more understandable in the event of a change or modification of case law.

2. Petitioners often attempt to proceed through the state system in an almost pro forma fashion merely for the purpose of avoiding a procedural default. The petitions do not comport to state procedural rules for meaningful development of a claim. The petitioners' purpose has been to reach the federal courts as quickly as possible because they are more likely to obtain greater resources and counsel will receive greater compensation all pursuant to federal statutes. *See* 21 U.S.C. § 848(q)(4)(B), *et seq*.

Upon reaching the federal courts, petitioners make broad requests for discovery and additional resources, often alleging that arbitrary deprivation of such resources in the state system prevented them form adequately developing or presenting their claims. Petitioners then claim arbitrary deprivation because state court orders often state no more than that the request is "denied." If orders were to specify the basis for denying additional resources, discovery, or evidentiary hearings, state appellate courts and federal courts could more effectively and efficiently review these requests to determine whether a petitioner is entitled to such services or procedures. A finding that a petitioner failed to articulate the basis for his request or that he failed to demonstrate good cause would be of significant value to reviewing courts.

These modifications would require petitioners to more carefully adhere to post-conviction rules in state court and would help to eliminate the apparent unfairness of the federal courts

reviewing claims presented in a substantially different light than when presented to the state courts. I believe this procedure is particularly appropriate in light of the Supreme Court's recent rulings in *McCleskey v. Zant*, 111 S.Ct. 1454 (1991) and *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715 (1992).

3. Another problem confronting our courts is determining in which forum a claim should be litigated. Obviously, the proble m involves primarily "new" claims raised in successive petitions.

If state remedies remain available, then federal law requires that the state courts first determine the merits of the claim. If no remedies are available, then a federal court may apply state procedural rules to find the claim procedurally barred. In some cases, however, this determination may be unclear resulting in the awkward "stay/abeyance" procedure discussed below.

As noted above, the uniform method of numbering claims would greatly reduce the confusion with respect to this issue.

B. *Rule 32*:

As previously noted, petitioners often place the state and federal courts in a virtual "tug of war." This conflict can occur when a petitioner is attempting to litigate matters in both forums simultaneously. A brief explanation of the procedural posture in these situations may be helpful to explain the need for the suggested amendment to Rule 32.

1. Procedural Posture

Once the amended federal petition is filed, inevitable new and previously unpresented claims are raised. At this point, the federal court has three choices: dismiss the petition to allow for state exhaustion; find the claims barred and resolve the petition; or hold the petition in abeyance pending exhaustion of the claims in state court.

The only time the abeyance procedure is utilized is when it is unclear whether state remedies remain available for the presentation of a claim under the exceptions to Rule 32.2. The federal court may choose to hold a petition in abeyance as opposed to dismissing the petition to ensure that a warrant of execution is not issued prior to an adjudication of petitioner's claims or a determination is made as to their procedural posture.

2. Problem

The abeyance procedure is disruptive and disfavored. A case remains in federal court for purposes of continuing a stay of execution, yet all activity is occurring in state court. This procedure tends to allow cases to languish in both forums for an inordinate amount of time. The only reason it is utilized is because a procedural anomaly exists in Rule 32.

Defendants commence a successive Rule 32 proceeding by filing a petition in the Superior Court. However, any stay of execution on a successive Rule 32 petition must be obtained from the Arizona Supreme Court pursuant to Rule 32.4 (f). Rule 32.4 (f) requires defendants to demonstrate why their new claims would not be precluded from review under Rule 32.2

The problem facing this Court is what to do when the Arizona Supreme Court denies a stay of execution, but the petition itself remains pending in the Superior Court. (Another twist to this procedure occurs when a petitioner files a successive petition in the Superior Court but fails to file for a stay of execution in the Supreme Court.)

Arguably, a finding of preclusion has already been rendered by the denial of a stay. However, nothing within the Arizona Rules of Criminal Procedure prevents the Superior Court judge from adjudicating the petition and rendering a decision on the merits. Thus, in an emergency, petitioners claim state procedures are ineffective and request the federal court to stay their execution pending completion of state proceedings.

3. Proposed Amendment

One idea we discussed is a possible amendment to Rule 32.4 (f) as follows:

> [N]o stay of execution shall be granted upon the filing of a second or subsequent petition except upon separate application for a stay to the Supreme Court, setting forth with particularity those issue not precluded under Rule 32.2. <u>If it is determined by the Supreme Court that defendant is not entitled to a stay because any new claims would be precluded or because the claims have been previously presented and denied on the merits, the Superior Court judge shall immediately adopt the findings of the Supreme Court, dismiss the petition, and terminate the successive Rule 32 proceeding.</u>

[Proposed amendment consists of underlined language]

4. Benefits

The proposed amendment would significantly reduce confusion between the state and federal systems, ensure adjudication of claims presented in a procedurally appropriate manner, and reduce the state court's docket as well as the time for processing successive state petitions.

When confronted with an issue of exhaustion, the federal court could immediately dismiss the petition and vacate the stay of execution. Petitioners could then commence their successive Rule 32 proceeding. If a new warrant is issued, the petitioner could apply for a stay to the Supreme Court, and, if it is denied, petitioner's state proceedings would terminate and petitioner would file a new action in federal court presenting only exhausted claims.

As we discussed, the purpose of our discussion is to develop and modify some procedures to bring a more orderly and effective review of claims of error to the courts. In many instances, the

petitioner has significant burdens of proof under Rule 32. Under *McCleskey* and *Tamayo-Reyes*, the perfection of the record at the initial appeal and post-conviction relief petition is essential. Obviously, these ideas must be "kicked around" by a wider circle of interested parties. However, it is a beginning.

I look forward to hearing your views and concerns.

Very truly yours,

Stephen M. McNamee
United States District Judge

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